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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

DAVID L. MILLER,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 02-4050-JAR
)	
)	
GARY L. DORR, et al.,)	
)	
)	
_____ Defendant.)	
_____)	
GARY L. DORR,)	
)	
Plaintiff,)	
)	
)	Case No. 02-4069-JAR
vs.)	
)	
)	
DAVID LEE MILLER, et al.,)	
)	
Defendants.)	
_____)	

**MEMORANDUM ORDER AND OPINION REGARDING
APPORTIONMENT OF ATTORNEY FEES**

On May 14, 2003, this Court entered a Memorandum Order and Opinion Regarding Settlement Apportionment (Doc. 85) directing the parties to submit documentation and additional briefing on the issues of allocation of attorneys fees. The parties have complied (Docs. 87 and 88) and the Court is ready to rule.

Background

The Court incorporates the detailed statement of facts set forth in its previous order. Counsel for Miller has filed a response indicating that he had a contingency fee agreement with Miller that provided for attorney fees of 40% of the amount recovered, less expenses of litigation, after suit was filed. As of May 15, 2003, \$6,476.67 has been incurred as costs of litigating this case. Less expenses, \$29,523.33 was recovered after filing suit. Miller contends that pursuant to the contingency contract, attorney fees are \$11,809.33.

Analysis

N.C.Gen. Stat. sec. 97-10.2(j) was amended in 1999 to provide that notwithstanding any other subsection in the section, in the event that a settlement has been reached by the employee and the third party, either party may apply to the court to determine the subrogation amount. After notice to the employer and insurance carrier and an opportunity to be heard by all interested parties, and with or without the consent of the employer, the court must determine, in its discretion, the amount, if any, of the employer's lien, *and the amount of cost of the third-party litigation to be shared between the employee and the employer.*¹ Thus, the Court has specific jurisdiction to determine and allocate attorney fees.

Section 97-10.2(f) directs that attorney fees paid under subsection (f)(1) "shall be paid by the employee and employer in direct proportion to the amount each shall receive under (f)(1) c and (f)(1)d hereof and shall be deducted from such payments when distribution is made." This statute applies to the Industrial Commission's authority to disburse monies and confers. Unlike

¹*Id.* (emphasis added).

the Commission, the Court is not bound by this subsection, although it does provide guidance.²

Jevic argues that to assess Miller's counsel fees against its subrogation lien is inequitable because Jevic has had to retain counsel to protect its lien. In the alternative, Jevic argues that Miller's fees should be apportioned 1/6 to Jevic, and 5/6 to Mrs. Miller. Miller agrees with this apportionment amount, although it requests fees in the amount of 40% of the amount recovered in excess of the North Carolina one-third statutory limit.³

Based on the foregoing, the Court shall apportion the attorney fees and costs as follows. Although Miller and his counsel contracted for a 40% contingency fee, the Court shall limit that fee to one-third of the amount recovered in accordance with North Carolina law, or \$9,841.11. Miller successfully argued before this Court that North Carolina was the proper choice of law in determining Jevic's subrogation lien and the Court sees no reason to deviate from that law in determining the proper amount of fees. With this adjustment, the Court finds that the attorney fees are reasonable in light of the time invested in the case and the results achieved by the settlement agreement.

The Court further agrees with the parties that allocating fees and expenses proportionately with the parties' recovery is the most equitable course. Jevic does not cite, nor was the Court able to find, any authority for its argument that it should bear no costs in this matter. Under the Court's previous order, Jevic is to receive 1/6 of the gross recovery, or 16.666666%. Thus, Jevic shall be responsible for 16.666666% of the expenses and fees herein, or \$1,640.18 of the attorney fees and \$1,079.45 of the expenses, for a total of \$2,719.63, to be

²*Levasseur v. Lowery*, 139 N.C. App. 235, 243-44, 533 S.E.2d 511(2000).

³ N.C. Gen. Stat. sec. 97-90(c) and sec. 97.10.2(f)(1).

deducted from its subrogation lien amount of \$6,000.00. The 5/6 balance of the fees shall be the responsibility of Mrs. Jevic and deducted from her settlement amount of \$30,000.00.

IT IS SO ORDERED.

Dated this 24th day of June 2003.

S/ Julie A. Robinson
Julie A. Robinson
United States District Judge